

IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

GABRIEL CONTRERAS,

Plaintiff,

v.

FERNANDO TUVERA, et al.,

Defendants.

No. C 15-05510 EJD (PR)

ORDER OF SERVICE; DIRECTING  
 DEFENDANTS TO FILE  
 DISPOSITIVE MOTION OR  
 NOTICE REGARDING SUCH  
 MOTION; INSTRUCTIONS TO  
 CLERK

Plaintiff, a state prisoner, filed the instant civil rights action in pro se pursuant to 42 U.S.C. § 1983 against medical officials at Salinas Valley State Prison (“SVSP”) where he is currently incarcerated, and against employees at the California Correctional Health Services in Elk Grove. Plaintiff’s motion for leave to proceed in forma pauperis will be granted in a separate order.

## DISCUSSION

### A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a

governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. See id. § 1915A(b)(1),(2). Pro se pleadings must, however, be liberally construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988).

#### **B. Plaintiff's Claims**

Plaintiff claims that since August 2010, he has complained to various prison medical personnel at SVSP regarding his external/internal hemorrhoids, which also involved "profuse rectal bleeding and severe rectal pain when using the toilet... among other things." (Compl. at 5.) He claims that Defendants were deliberately indifferent to his serious medical needs from the time he first submitted a health care service request on July 2, 2013, until August 4, 2015, when he finally received a hemorrhoidectomy. (Id. at 5-20.) Liberally construed, Plaintiff states a cognizable Eighth Amendment claim for deliberate indifference to serious medical needs. See Estelle v. Gamble, 429 U.S. 97, 104 (1976).

### **CONCLUSION**

For the reasons stated above, the Court orders as follows:

1. The Clerk of the Court shall mail a Notice of Lawsuit and Request for Waiver of Service of Summons, two copies of the Waiver of Service of Summons, a copy of the complaint, all attachments thereto, and a copy of this order upon **Defendants Dr. Fernando Tuvera, Nurse Patricia Adams, Dr. Anise Adams, Nurse Eric Golding, Dr. Darrin Bright, Dr. John Dunlap, Dr. Lawrence**

1 **Gamboa, Dr. Roy Kim, Dr. Palmer, Nurse H. Hanter, and Dr. K. Kumar** at  
2 **Salinas Valley State Prison**, (P.O. Box 1050, Soledad, CA 93960), and **Defendants**  
3 **R. Robinson and J. Lewis** at **California Correctional Health Services**, (P.O. Box  
4 588500, Elk Grove, CA 95758) . The Clerk shall also mail a copy of this Order to  
5 Plaintiff.

6 2. Defendants are cautioned that Rule 4 of the Federal Rules of Civil  
7 Procedure requires them to cooperate in saving unnecessary costs of service of the  
8 summons and the complaint. Pursuant to Rule 4, if Defendants, after being notified  
9 of this action and asked by the Court, on behalf of Plaintiff, to waive service of the  
10 summons, fail to do so, they will be required to bear the cost of such service unless  
11 good cause shown for their failure to sign and return the waiver form. If service is  
12 waived, this action will proceed as if Defendants had been served on the date that  
13 the waiver is filed, except that pursuant to Rule 12(a)(1)(B), Defendants will not be  
14 required to serve and file an answer before **sixty (60) days** from the day on which  
15 the request for waiver was sent. (This allows a longer time to respond than would be  
16 required if formal service of summons is necessary.) Defendants are asked to read  
17 the statement set forth at the foot of the waiver form that more completely describes  
18 the duties of the parties with regard to waiver of service of the summons. If service  
19 is waived after the date provided in the Notice but before Defendants have been  
20 personally served, the Answer shall be due **sixty (60) days** from the date on which  
21 the request for waiver was sent or **twenty (20) days** from the date the waiver form is  
22 filed, whichever is later.

23 3. No later than **ninety (90) days** from the date of this order, Defendants  
24 shall file a motion for summary judgment or other dispositive motion with respect to  
25 the claims in the complaint found to be cognizable above.

26 a. If Defendants elect to file a motion to dismiss on the grounds  
27 Plaintiff failed to exhaust his available administrative remedies as required by 42  
28 U.S.C. § 1997e(a), Defendants shall do so in an unenumerated Rule 12(b) motion

1 pursuant to Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied  
2 Alameida v. Terhune, 540 U.S. 810 (2003). **The Ninth Circuit has held that**  
3 **Plaintiff must be provided with the appropriate warning and notice under**  
4 **Wyatt concurrently with Defendants' motion to dismiss. See Woods v. Carey,**  
5 **Nos. 09-15548 & 09-16113, slip op. 7871, 7874 (9th Cir. July 6, 2012).**

6 b. Any motion for summary judgment shall be supported by  
7 adequate factual documentation and shall conform in all respects to Rule 56 of the  
8 Federal Rules of Civil Procedure. Defendants are advised that summary judgment  
9 cannot be granted, nor qualified immunity found, if material facts are in dispute. If  
10 any Defendant is of the opinion that this case cannot be resolved by summary  
11 judgment, he shall so inform the Court prior to the date the summary judgment  
12 motion is due.

13 4. Plaintiff's opposition to the dispositive motion shall be filed with the  
14 Court and served on Defendants no later than **twenty-eight (28) days** from the date  
15 Defendants' motion is filed.

16 a. **In the event Defendants file a motion for summary**  
17 **judgment, the Ninth Circuit has held that Plaintiff must be concurrently**  
18 **provided the appropriate warnings under Rand v. Rowland, 154 F.3d 952, 963**  
19 **(9th Cir. 1998) (en banc). See Woods, Nos. 09-15548 & 09-16113, slip op. at**  
20 **7874.**

21 Plaintiff is also advised to read Rule 56 of the Federal Rules of Civil  
22 Procedure and Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (holding party  
23 opposing summary judgment must come forward with evidence showing triable  
24 issues of material fact on every essential element of his claim). Plaintiff is cautioned  
25 that failure to file an opposition to Defendants' motion for summary judgment may  
26 be deemed to be a consent by Plaintiff to the granting of the motion, and granting of  
27 judgment against Plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52, 53-54  
28 (9th Cir. 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

1           5. Defendants shall file a reply brief no later than **fourteen (14) days**  
2 after Plaintiff's opposition is filed.

3           6. The motion shall be deemed submitted as of the date the reply brief is  
4 due. No hearing will be held on the motion unless the Court so orders at a later date.

5           7. All communications by the Plaintiff with the Court must be served on  
6 Defendants, or Defendants' counsel once counsel has been designated, by mailing a  
7 true copy of the document to Defendants or Defendants' counsel.

8           8. Discovery may be taken in accordance with the Federal Rules of Civil  
9 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or  
10 Local Rule 16-1 is required before the parties may conduct discovery.

11           9. It is Plaintiff's responsibility to prosecute this case. Plaintiff must  
12 keep the court informed of any change of address and must comply with the court's  
13 orders in a timely fashion. Failure to do so may result in the dismissal of this action  
14 for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

15           10. Extensions of time must be filed no later than the deadline sought to be  
16 extended and must be accompanied by a showing of good cause.

17  
18 DATED: 3/10/2016

  
EDWARD J. DAVILA  
United States District Judge